No. 93-1170

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* FREEDOM TO READ FOUNDATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., PEOPLE FOR THE AMERICAN WAY, PEN AMERICAN CENTER AND THE NATIONAL WRITERS UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association ("ALA"). The ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 institutions, primarily libraries, and more than 54,000 individuals, primarily librarians. The ALA established

the Foundation in order to promote and defend First Amendment rights, foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and set legal precedent for the freedom to read of all citizens.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately two hundred members include most of the major commercial book publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

The National Writers Union ("NWU") is an affiliate of the United Auto Workers, AFL-CIO, committed to improving the rights of freelance writers through the collective strength of its members. Founded in 1983, the NWU has thirteen local chapters throughout the country and some 4,000 members including journalists, novelists, biographers, historians, poets, children's book authors, textbook authors, commercial writers, technical writers and cartoonists. The NWU frequently testifies on First Amendment issues, and fervently believes that freedom of expression is essential to ensuring both the quality and diversity of information available in a free society.

PEN American Center ("PEN") is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors, chartered to defend free and open communication within all nations and across national boundaries. PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb, or limit freedom of speech or expression. Among its members are executive branch employees who are directly affected by the challenged statute.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has represented parties in litigation and filed *amicus* briefs before this Court in major cases defending the First Amendment's guarantee of freedom of expression. It joins in this *amicus* brief because this case raises dual concerns of protecting the First Amendment rights of employees to speak and the public to hear, as well as the integrity of our democratic political process.

The primary function of the *amici* writers' organizations is to encourage, support, and advance all authors' rights—including authors who happen to be government employees—to the end of maximizing creative expression for distribution to the public. The primary function of libraries and publishers is to make protected expression available to the public. The *sine qua non* of their existence is the ability to acquire new writings that can be made available for public distribution. *Amici* are participating here because this case raises important First Amendment questions not only for the government employees whose speech is deterred by the challenged statute, but also for those members of the public who will be deprived of the opportunity to read the articles and hear the speeches of those government employees who will no longer write or speak in the absence of compensation for their efforts. Additionally, the statute directly affects many members of the *amici* groups such as librarians and other employees of federal libraries, many of whom are members of ALA, as well as many government employee writers who are members of the various writers' organizations.

Because the honorarium ban will deter government employees from speaking and/or writing, the ban will reduce the amount of materials available for public dissemination by writers, publishers and libraries, and for review by the public. Thus, the ban threatens the mission of publishers and libraries, and violates the First Amendment rights of the reading public as well as of the government employees who have been silenced. For this reason, *amici* urge this Court to hold that the honorarium ban violates the First Amendment.

STATEMENT

Amici adopt respondents' statement of the case.

SUMMARY OF ARGUMENT

The statute challenged in this case bars Executive Branch and other federal employees from receiving an honorarium for any single speech, appearance, or article, whether or not related to their jobs. Reform Act § 601(a), 103 Stat. 1760, codified at 5 U.S.C. App. 501(b) (Supp. IV 1992) ("section 501(b)").[1] This Court has recognized that imposing a financial disincentive on speech, or removing a financial incentive to speak, can constitute a significant burden on First Amendment rights. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S. Ct. 501, 508-09 (1991). Here, it is clear that many government employees will not write or speak without compensation. As a result, section 501(b) will effectively prevent the public from having the opportunity to read or listen to these government employees, even on subjects completely unrelated to their jobs. Such a statute imposes a substantial burden on protected speech.

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[1] As noted *infra*, the statute allows compensation for a *series* of speeches, articles or appearances unrelated to an employee's job. It imposes no limit on compensation for other forms of expression.

Moreover, there is no governmental interest justifying this substantial burden. If the government's interest is in preventing government employees from profiteering—trading on information or skills obtained by virtue of their federal employment—then the statute covers far more speech than could affect that interest since the statute requires no nexus between the expression and the employees' federal employment. On the other hand, if the government's interest is in preventing covert payoffs, then the statute is too narrow because it allows unlimited compensation for some types of expression, but no compensation for others. For example, since the ban applies only to works of non-fiction, an employee would be barred from being paid $100 for writing a biographical article about Abraham Lincoln, but could be paid a million dollars for writing a fictionalized account of life in the Lincoln White House. Similarly, since the ban does not apply to a "series" of speeches or articles (unless they are related to an employee's job), there would be no limit on compensation for a *series* of historical articles about Lincoln. These distinctions are inexplicable if the interest being served is the prevention of corruption.

Finally, it is difficult to credit any asserted interest in avoiding case-by-case determinations about the permissibility of honoraria, when the statute itself requires such determinations in many cases. Thus, for example, Congress apparently believed it was practical to determine whether a given "series" of speeches or articles have a nexus to an employee's job. That determination cannot be more difficult with respect to *single* articles, speeches or appearances.

In sum, the statute imposes a substantial burden on speech and will reduce the pool of materials available for libraries and publishers to disseminate. The governmental interests that have been or could be asserted to justify this burden are either insufficient or implausible. Before the Court can uphold a law imposing a substantial burden on expression, it should demand more.

ARGUMENT

This case involves the claim that section 501(b), by banning Executive Branch employees[2] from accepting compensation for any article, speech, or appearance, imposes a significant and unjustified burden on protected speech. This Court's decisions involving restrictions on government-employee speech, *see, e.g., Waters v. Churchill*, 114 S. Ct. 1878 (1994), as well as other cases involving substantial, but content-neutral, burdens on speech, *see, e.g., Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 62 U.S.L.W. 4647, 4658 (June 28, 1994), all support application of at least an intermediate balancing test in this context.[3] In *Turner*, this Court very recently applied this intermediate level of scrutiny to content-neutral provisions of the Cable Act and held that the regulation could be sustained only if it furthered a substantial governmental interest, and if the " 'restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " *Id.* at 4658 (citation omitted). The Court added that "[n]arrow tailoring in this context requires . . . that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

In essence, applying the intermediate scrutiny level of review requires the Court to determine whether there is a substantial burden imposed on speech and, if so, whether substantial governmental interests exist to justify both the nature and the extent of that burden. The proper

[2] This action challenges the statute only as it applies to Executive Branch employees.

[3] Because the statute distinguishes between fiction and nonfiction, it could be viewed as a content based restriction that would be subject to strict scrutiny. It is not necessary to reach that point, however, because the statute plainly fails even intermediate scrutiny.

resolution of these questions here is relatively straightforward: the honorarium ban obviously imposes a substantial burden on First Amendment rights, and there is no government interest that plausibly justifies such a burden.

I. THE FINANCIAL DISINCENTIVE IMPOSED BY THE CHALLENGED STATUTE IS A CONSTITUTIONALLY SIGNIFICANT BURDEN.

This Court has recognized that the First Amendment's guarantee of freedom of speech prohibits the government from imposing unjustified financial disincentives upon those who choose to engage in protected expression. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508-09 (1991). Indeed, the United States effectively concedes this point, noting that "removing a financial incentive to engage in expression does trigger First Amendment concern." Pet. Br. at 15 (citing *Simon & Schuster*). The government, however, then attempts to ease its burden of justification, arguing that any interference with protected expression caused by this statute is limited to government employees, who receive government salaries and remain free to speak without compensation. This effort to skew the constitutional balance, before the governmental interests are even examined, should be rejected. Section 501(b) imposes a sweeping limitation on the speech of hundreds of thousands of Americans, and can only be upheld if there are concrete and convincing governmental interests that support this degree of restriction.

A. The Case Law Demonstrates That a Financial Burden on First Amendment Rights Requires Heightened Scrutiny.

This Court has consistently held that a law preventing would-be speakers from receiving financial rewards for their speech constitutes a significant burden on First Amendment rights, requiring demonstration that a sub-

stantial governmental interest is furthered by that burden. Most recently, for example, in *Simon & Schuster,* the Court invalidated a New York statute requiring that proceeds from any writing by a convicted felon relating to his crimes be escrowed in a fund available for compensating the author's victims. After five years, any remaining funds were to be distributed to the author. 112 S. Ct. at 511. Thus, the statute did not necessarily *preclude* compensation. Rather, it delayed it, while creating the *possibility* that compensation would be denied altogether depending on the circumstances of a given case. In determining the degree of the burden on First Amendment rights, the Court reviewed a long list of serious works of literature which would likely come within the statute's sweep. It noted that "[t]he argument that a statute like the Son of Sam law would prevent publication of *all* of these works is hyperbole—some would have been written without compensation." *Id.* at 511. Yet the Court treated the potential interference with compensation as a serious burden on First Amendment rights.

The chilling effect on speech caused by financial disincentives was also at issue in *Meyer v. Grant,* 486 U.S. 414, 421-23 (1988). There, the Court struck down a Colorado statute that prohibited compensation to petition circulators. It concluded that the effect of the statute was to limit the number of voices who would convey appellants' message, because even though some petition circulators would circulate petitions without pay, many would not. Thus, the statute effectively limited the size of the audience for the petitions.[4]

[4] In a related context, the Court has also held that an ordinance prohibiting solicitation of contributions by charitable organizations that did not use at least 75 percent of their receipts for "charitable purposes" was an unconstitutional financial burden on the charities' First Amendment rights that would chill the exercise of those rights. *Village Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). *See also, Secretary of State of Md. v. Joseph H. Munson Co., Inc.,* 467 U.S. 947 (1984) (statute prohibiting charitable organization from using more than 25 percent of funds raised to defray expenses of fundraising violated the First Amendment because financial disincentive would chill protected speech); *Riley v. National Federation of the Blind of N.C., Inc.,* 487 U.S. 781 (1988) (statute limiting fundraisers to charging "reasonable" fees, and linking presumptively reasonable fees to percentage of amount raised, violated First Amendment).

Simon & Schuster and *Meyer* recognize that preventing compensation will result in less speech. These cases assume the truth of what the government here has not contested: although some people will write or speak for free, many will not. *See also Secretary of State of Md. v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 967 (1984) (statute imposing financial limits on expenses of fundraising would likely "restrict First Amendment activity").

That same reality was expressly recognized by the Framers of the Constitution, when they provided that "The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8. The constitutional and statutory grant of copyright protection "is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984). "Absent such [copyright] protection, there would be little incentive to create or profit in financing such [writings], and the public would be denied an important source of historical information." *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 557 (1985).

As the copyright analogy suggests, the ultimate basis for recognizing a First Amendment right to receive compensation for speech is the interests of those who might otherwise never hear or read that expression. "Freedom of speech presupposes a willing speaker," but "the protection afforded is to the communication, to its source and to *its recipients both.*" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (emphasis added). Thus, in the broadcasting context, the Court has stated that "[i]t is the right of viewers and listeners . . . which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive . . . ideas . . . which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90. *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

It does little good, after all, to leave publishers the freedom to publish new works, and libraries the freedom to purchase and lend them, if those works are not being written. And there is a limit to how much will be written without hope of compensation. Many valuable works are created primarily, if not solely, because the author hopes to receive fair payment in return for the value of the information being communicated. It is thus no answer, when a law prevents compensation for protected speech, to say that the speaker remains at liberty to speak for free. Such a law interferes substantially with the interests of the speaker, of those who would make the speech available, and of those who would ultimately hear it, and thus harms the overall system of free expression. It requires a substantial justification.

B. The Financial Burden Imposed by This Statute Is Substantial.

Petitioners mount a number of arguments in an effort to show that the "burden" in this case is relatively inconsequential. This effort is both irrelevant and unpersuasive. It is irrelevant because it is conceded in this case that the honorarium ban burdens protected speech. Once that concession is made, the analytic focus should shift to the identification of substantial countervailing government interests, and a determination whether they could be served less intrusively.[5]

In any event, petitioners fail in their effort to minimize the effects of the ban. First, they point out that the ban only applies to government employees. Pet. Br. 14. Although this fact is relevant to the types of governmental interests that may justify the ban, it should not by itself lessen the degree of scrutiny accorded to a law that interferes with the free expression of hundreds of thousands of citizens on topics wholly unrelated to their government employment. Public employees do not check their First Amendment rights at the door when they enter government service. And a great many of them have expertise and knowledge on a vast array of subjects of interest to the public at large. Thus, for example, among the employees who filed affidavits in this case, the proposed topics of compensated discourse range from Russian history (J.A. 38-39) to the repopulation of wolves in the national forests (J.A. 67) to dance criticism (J.A. 77).

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[5] A true "balancing" test—weighing a speech restriction of a particular severity against a state interest of a particular significance—would be wholly incoherent and subjective. The proper approach, as suggested by *Turner Broadcasting, supra*, and *United States v. O'Brien*, 391 U.S. 367, 377 (1968), is to determine whether the restriction is sufficient to trigger heightened scrutiny and *then* examine whether the restriction actually furthers substantial government objectives without burdening speech more than is reasonably required.

Government has historically attracted workers with interests beyond the confines of their government job. A list of this country's preeminent authors includes many who served as government employees at one time or another. For example, Herman Melville was a customs inspector; Sydney Lanier was a postal clerk in Macon, Georgia; Walt Whitman copied documents for the Department of the Interior and in the Attorney General's office; Thomas Paine was an exciseman while still in England; Nathaniel Hawthorne was a "measurer of salt, coal, etc." at Boston Custom House and a surveyor at Salem Custom House; and O. Henry was a draftsman in a state land office. While it would be hyperbole to suggest that these writers would not have written their important works had this statute been in effect during their government tenure, the point is that government employees, like all other citizens, may have profound reflections or even simply useful information—completely unrelated to their jobs—the expression of which, and the receipt of which, are fully protected by the First Amendment. As writers, publishers and libraries, *amici* are keenly aware that the effect of the lost incentive to create is the loss of materials created, and the consequent reduction of material in library collections and on publishers' lists.

The government also points out that employees (1) may recover the costs of travel and other direct costs they incur in writing or speaking, (2) have government salaries to support them, and (3) may accept compensation for a variety of forms of expression *other* than speeches and articles. Pet. Br. 16-17. But these arguments miss the mark as well. The constitutional concern in this case is not the impoverishment of federal workers who would otherwise have received honoraria, but the potential for interference with the flow of a broad category of protected expression. The government does not deny that this potential exists, despite the allowance of expense reimbursement, the payment of salaries to the affected persons,

and the availability of compensation for other kinds of speech. Pet. Br. 17 ("Some federal employees will undoubtedly choose not to engage in one or more of these activities because they cannot be paid for doing so."). Nor could it deny the obvious—*i.e.*, that when compensation for one activity is banned, the affected parties will tend to do something else.[6]

II. PETITIONERS HAVE NOT SHOWN THAT THE STATUTE'S INTERFERENCE WITH PROTECTED EXPRESSION IS JUSTIFIED BY A SUBSTANTIAL GOVERNMENTAL INTEREST.

Once the spotlight of judicial inquiry focuses on the second prong of the balancing test—the government's justification for burdening its employees' First Amendment rights—it becomes clear why the government tried so hard to minimize the burden it is imposing. For if that burden is taken for what it is—a substantial interference with First Amendment interests requiring a substantial justification—petitioners cannot prevail: they cannot articulate a governmental interest that is sufficiently substantial to justify the statutory restriction at issue.

The most obvious rationale for banning compensation for speech by government employees during "off hours" would be to prevent profiteering—*i.e.*, trading on knowledge or skills developed on the job at government expense. Petitioners cannot make such an argument, however, because the ban extends to expression that has nothing to do with a speaker's public employment. They neverthe-

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[6] A government employee who accepts compensation in violation of this law may be subjected to a civil penalty of up to $10,000. 5 U.S.C. App. 504(a). Although the government argues that this provision *reduces* the chilling effect of the statute because the statute does not provide a *criminal* penalty, *see* Pet. Br. at 43, n.30, it seems obvious that the average government worker would find the prospect of paying out $10,000 more than slightly numbing.

less attempt to do so indirectly, arguing that if the ban were limited to speech with a nexus to government employment, there would be a potential for "evasion." Pet. Br. 18. This assertion is nonsensical. It is true, of course, that under a nexus test there would be borderline cases where the presence or absence of a connection to a speaker's government job would be unclear. But we doubt petitioners mean to argue that Congress may ban honoraria for all speeches, articles, and appearances merely because of the possibility that some employees will attempt to evade a more focused ban in those cases where the nexus to government employment is less than clear.

Next, petitioners argue that banning honoraria (even for speeches or articles unrelated to government employment) is valuable for its own sake, as a means of preventing corruption and the appearance of impropriety. This "corruption" rationale depends on the proposition that payments for speeches and articles, regardless of their topics, will sometimes constitute covert efforts to purchase influence, or at least will be so perceived by the general public. That proposition is at least plausible, but there is a clear problem: this articulated interest bears no relation to the forms of compensation that Congress chose to permit and to forbid. To begin with, the statute bars *any* compensation for a speech, article or appearance, even in amounts too small to create any actual or apparent impropriety. At the same time, it permits unlimited compensation for other kinds of expression or conduct that raise the same "covert payoff" questions.

Thus, for example, the ban allows compensation to writers of fiction, poetry, song lyrics or plays, but bars compensation to writers of history, science, philosophy, art, or any other non-fiction topic. 5 C.F.R. § 2636.203(d). It allows compensation for books or chapters of books, but not for works to be published in magazines or other collections of articles. *Id.* An "appearance" is defined

to preclude honoraria for attendance at public or private conferences, meetings, or other gatherings and remarks made at that time, but not for "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 5 C.F.R. § 2636.203(b). Under these regulations, then, government employees are allowed to accept compensation for playing in a softball game, or for modeling in a fashion show, but a government employee who happened to be a descendent of Samuel Clemens could not accept compensation for appearing and speaking at a festival honoring their ancestor. A government employee could be compensated for an appearance as a stand-up comic, but not for an appearance as a botanist. There is no conceivable basis for explaining these distinctions in terms of the government's articulated interest in preventing actual or apparent corruption.

Similarly, the regulations that disallow compensation for "speeches" *allow* compensation for the recitation of scripted material (unless the invitation was extended because the speaker was a government official) and for conducting religious ceremonies (except that an employee who is a minister may not receive compensation for taking part in a service conducted by another minister). *Id.* § 636.203(c). Finally, if the government employee can string out her work product into a "series" of three or more "different but related" articles, speeches, or appearances that are not directly related to her official duties, then compensation is allowed; if she is concise and succinct, however, compensation is prohibited. *Id.* § 2636.203(a)(13).[7]

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[7] The statute defines "honorarium" as "a payment of money or any thing of value for an appearance, speech, or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government)." 5 U.S.C. § 505(3).

Under these rules, absurd results often obtain. A government employee may be compensated for writing a poem about jonquils for the local horticulturists' club newsletter, but may not be compensated for giving a speech to the same club about how to grow them. A government employee may be compensated for writing a fictionalized but historically accurate article about Lincoln's writing of the Gettysburg address, but may not be compensated for writing a simply historically accurate one. These examples make clear that the ban disallows compensation only for particular kinds of expression although other kinds of expression *on exactly the same subject to exactly the same audience* are compensable.

Because the ban singles out particular kinds of expression for unfavorable treatment, but allows other kinds of expression without penalty, it cannot be said to further the government's asserted interest. Indeed, these arbitrary distinctions among media and categories of speech not only undermine the government's case but raise additional concerns of their own. *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down tax applicable to general interest magazines, but not to newspapers or religious, professional, trade and sports journals). Moreover, this distinction between kinds of writing for compensation affects *amici*. Library collections and publishers' lists are incomplete and do not serve the public without a broad range of materials, including non-fiction.

The government's final argument is that it may impose a flat ban on honoraria for particular forms of expression because a more discriminating rule would be less efficient. Pet. Br. 20-23 (narrower rule would require costly case-by-case determination). But it is difficult to take seriously an asserted interest in avoiding case-by-case determinations when the statute itself necessarily requires such determinations in many cases. After all, it defines " 'honorarium' " as "a payment of money or any thing of value

for an appearance, speech or article (including a series of appearances, speeches, or articles *if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government*)." 5 U.S.C. App. § 505(3) (emphasis added). Thus, the government is already required by statute to set up an administrative mechanism for applying a nexus test. And the government already requires the ethics officers in each agency to determine when a group of three or more articles constitutes a "series."

Indeed, even a single appearance, speech or article covered by the ban may raise case-by-case questions for the ethics officers. For example, if an employee writes a piece and submits it for publication as an article in a magazine, as well as to a textbook publisher, does compensation depend on whether it is accepted as a chapter in a book rather than as an article? Or, if a play in which an employee appears requires some improvisation by its actors, does that constitute the compensable reading of a script? Or, is an article on Thomas Jefferson treated as compensable "fiction" because it contains imaginary dialogue which may never have taken place, even though it is otherwise completely historically accurate?

In setting up the honorarium ban, Congress chose to create an administrative process to handle some questions raised by the ban, including determining when a "series" of speeches or articles is sufficiently connected with the employee's job that compensation should be denied because the integrity of the government might be questioned if compensation were allowed. The government has not shown that including single speeches, articles, or appearances in that process would significantly increase its administrative burden. In fact, most agencies already routinely make such determinations in applying other statutes and standards of conduct. *See e.g.*, Internal Revenue Service Rules of Conduct, J.A. at 212-219 (providing that compensation for outside activities may be approved for

IRS employees if that activity will not "A) result in a conflict of interest or the appearance of a conflict of interest with his/her official duties and responsibilities; or B) bring discredit upon or lower public confidence in the Internal Revenue Service; or C) interfere with his/her efficient performance of his/her duties or his/her availability for duty."). Moreover, even if requiring a nexus to insure that the regulation affects only the speech necessary to address the government's interest does marginally increase the government's administrative burden, that increase is constitutionally required by the First Amendment.

Here, as the court of appeals found, and as the government has recognized, much of the speech deterred by the honorarium ban is completely unrelated to the employee's job, and is made to audiences without any connection to the employee's job or agency. Because there is no nexus between the government's articulated interest—insuring the appearance of propriety and the public's confidence in government—and the denial of compensation for much expression that would not affect that interest, "a substantial portion of the burden on speech does not serve to advance [the statute's] goals." *Ward*, 491 U.S. at 799 (1986).

CONCLUSION

Because the honoraria ban violates the First Amendment rights of the government employee speakers and writers, of publisher and library distributors, and of public listeners and readers, the decision of the United States Court of Appeals for the D.C. Circuit should be affirmed.

Respectfully submitted,

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